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Supreme Court, U.S.
FILED

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No. 97-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

FELIX A OLIVIERI,

Petitioner,

v.

MATT L. RODRIGUEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a municipality discharges a probationary police officer on grounds which carry the scarlet letter of perpetual unemployability as a police officer,

Must the reasons for the discharge be publicly disseminated before the employee is entitled to the name clearing hearing recognized by *Board of Regents v. Roth,* 408 U.S. 564, 573 n.12 (1972)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Felix A. Olivieri respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 15, 1997.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-6) is reported at 122 F.3d 406. The opinion of the district court (App. 8-13) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 7) was entered on August 15, 1997.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

While employed by the City of Chicago as a probationary police officer, petitioner was discharged on allegations of sexual harassment.[1] At the time of his discharge, petitioner had successfully completed training, but as a probationary employee, he did not have a right under state law to receive

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1. Petitioner has consistently denied these allegations and contends that the accusations of sexual harassment were contrived to harass, inconvenience, and embarrass him.

a hearing on the allegations of wrongdoing.

As a result of his discharge, petitioner has been unable to find other employment as a police officer. (App. 8-9.) Department Prospective police employers have uniformly refused to employ petitioner on learning of the reason for his discharge from the Chicago Police. (Id.)

Petitioner commenced this action under 42 U.S.C. §1983 to obtain the "name clearing hearing" mandated by *Board of Regents v. Roth,* 408 U.S. 564, 573 & n.12 (1972). The district court dismissed the action, applying the "communication" requirement that the Seventh Circuit had engrafted on *Board of Regents v. Roth* liberty interest claims. (App. 11.) On appeal, the Seventh Circuit acknowledged an intercircuit conflict on the "communication requirement" (App. 3) and re-affirmed its position on this issue. (Id.)

REASONS FOR GRANTING THE WRIT

The circuits are divided on whether a public employee who is discharged on grounds which render him (or her) permanently unemployable in a particular occupation may maintain an action for damages under 42 U.S.C. §1983 without establishing that the defendant disseminated the basis for the employee's discharge.

In *Schware v. Board of Bar Examiners,* 353 US. 232 (1957), the Court held that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment." Id. at 238-39. The Court reaffirmed this view of the Due Process Clause in *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), referring to a constitutional "right to follow a chosen trade or profession," id. at 895-96, and again in *Board of Regents v. Roth,* 408 U.S. 564 (1972), where the Court held that the Due Process Clause would be implicated if "the State, in declining to re-employ respondent, imposed

on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id. at 573. "In such a case, due process would accord an opportunity to refute the charges before University officials." Id.

In *Ratliff v. City of Milwaukee,* 795 F.2d 612 (7th Cir. 1986), the Seventh Circuit engrafted onto the *Roth* name clearing hearing a "communication requirement," holding that that "[a]bsent proof that the Police Department or any of the defendants disseminated the stigmatizing information in a manner which would reach future potential employers of the plaintiff or the community at large, she cannot show that the defendants' actions impinged on her liberty interest in pursuing her occupation." 795 F.2d at 627.

As the court below observed (Pet.App. 3), the Court of Appeals for the Second, Fourth, and Eleventh Circuits have rejected this "communication requirement." In *Donato v. Plainview-Old Bethpage Cent. School Dist,* 96 F.3d 623, 631-32 (2d Cir. 1996) the Second Circuit held that the plaintiff need only show that "stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." Cases from the Fourth and Eleventh Circuits are in accord. *Ledford v. Delancey,* 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton v. City of Plant City,* 871 F.2d 1037, 1045 (11th Cir. 1989).

The Seventh Circuit's contrary rule — that dissemination by the defendant is required — is followed by the First and Third Circuits. *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 74-75 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't,* 840 F.2d 1139, 1148 (3d Cir. 1988);

The Fifth and Eighth Circuits, in the words of the court below (Pet. App. 3), "have hedged" on this issue. See, e.g., *Hogue v. Clinton,* 791 F.2d 1318, 1322-23 n. 7 (8th Cir. 1986); *Burris v. Willis Independent School District, Inc.,* 713 F.2d 1087, 1092 (5th Cir. 1983).

As petitioner pointed out to the Court of Appeals, "no police department will hire [petitioner] without asking him why he was fired by the Chicago Police Department. If [petitioner] answers truthfully, he will reveal the ground of the termination as effectively as (actually more effectively than) if the Department had taken out a full-page ad in every newspaper in the nation announcing the termination of Felix A. Olivieri for sexually harassing female probationary officers at the Chicago police training academy." (App. 2-3.)

Petitioner was discharged on grounds which brand him with the scarlet letter of perpetual unemployability as a police officer. Governmental action has deprived plaintiff of his constitutional "right to follow a chosen trade or profession," *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895-96 (1961), and further "communication" should not be required before petitioner is afforded the "opportunity to clear his name," recognized in *Board of Regents v. Roth,* 408 U.S. at 573 n.12.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

November, 1997

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4069

FELIX A OLIVIERI,

Plaintiff-Appellant,

v.

MATT L. RODRIGUEZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 7313 **James H. Alesia,** *Judge.*

Argued July 8, 1997--Decided August 15, 1997

Before Posner, Chief Judge, and Cudahy and Ripple, Circuit Judges,

Posner, Chief Judge.

A probationary Chicago police officer fired on grounds of having sexually harassed female probationers at the police training academy sued the police superintendent under 42 U.S.C. sec. 1983. The basis of the suit was the ex-officer's claim that firing him on such a ground has prevented him from obtaining other employment as a police officer and by doing this has curtailed his liberty of employment without due process because, being merely a probationer, he was not granted a hearing before (or for that matter after) he was fired. The district court granted summary judgment for the superintendent.

A line of cases that reaches back to *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), establishes that although defamation by a public officer is not a

constitutional tort, because the interest that it invades, the interest in reputation, is not deemed liberty or property within the meaning of the due process clauses of the Constitution, *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Dishnow v. School District*, 77 F.3d 194, 199 (7th Cir. 1996), when the character and circumstances of the defamation are such as to have "foreclose[d] his freedom to take advantage of other employment opportunities" he can bring a suit based on the deprivation of his liberty of employment or occupation. *Paul v. Davis, supra*, 424 U.S. at 710, quoting *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *see also, e.g., Bigby v. City of Chicago*, 766 F.2d 1053, 1057 (7th Cir. 1985); *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987); *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991). The classic case of this type, illustrated by *McGrath* itself, is a government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure. *See Board of Regents v. Roth, supra*, 408 U.S. at 573-74; *Colaizzi v. Walker, supra*, 812 F.2d at 307. The distinction between mere defamation and an infringement of liberty of occupation is merely one of degree, especially when the defamation relates to a person's fitness for a particular type of employment, but it is a distinction to which the courts are committed.

This case is unusual because there is no evidence that the defendant disclosed to anyone the grounds of the plaintiff's discharge. The plaintiff argues that this makes no difference to his employability because no police department will hire him without asking him why he was fired by the Chicago Police Department. If he answers truthfully, he will reveal the ground of the termination as effectively as (actually more effectively than) if the Department had taken out a full-page ad in every newspaper in the nation announcing the termination of Felix A. Olivieri for sexually harassing female

probationary officers at the Chicago police training academy. This type of argument has persuaded three circuits that dissemination by the defendant in a case such as this is not required after all. *Donato v. Plainview-Old Bethpage Central School District*, 96 F.3d 623, 631-32 (2d Cir. 1996); *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 45 (2d Cir. 1987); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989). Our court, however, insists on dissemination, *e.g.*, *Johnson v. Martin, supra*, 943 F.2d at 16-17 (explicitly rejecting *Brandt*); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986), as do the First and Third Circuits. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988). The Fifth and Eighth have hedged, *Hogue v. Clinton*, 791 F.2d 1318, 1322-23 n. 7 (8th Cir. 1986); *Burris v. Willis Independent School District, Inc.*, 713 F.2d 1087, 1092 (5th Cir. 1983), and the others haven't addressed the issue.

We are not disposed to depart from our position in this intercircuit conflict, and not only because stare decisis has its claims. The contrary position resembles the largely discredited doctrine of "compelled republication" or (more vividly) "self-defamation," which allows the victim of a defamation to satisfy the requirement of publication by publishing it himself, for example to prospective employers as in the present case. *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 911-12 (7th Cir. 1994); *Dishnow v. School District, supra*, 77 F.3d at 199; *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1553-54 (10th Cir. 1995). The doctrine is inconsistent with the fundamental principle of mitigation of damages. It is no doubt highly likely that the ground of Olivieri's discharge would become known to prospective employers, but it is not certain. A prospective employer might not ask him—might ask only the Chicago Police Department, which for all we know might refuse to disclose the grounds of Olivieri's

discharge; many former employers refuse to answer such inquiries, because of fear of being sued for defamation. The principle of self-defamation, applied in a case such as this, would encourage Olivieri to apply for a job to every police force in the nation, in order to magnify his damages; and to blurt out to each of them the ground of his discharge in the most lurid terms, to the same end. Most states, as noted in the decisions cited above, reject self-defamation as a basis for a tort claim, and it would be odd for federal constitutional law to embrace this questionable doctrine.

A further consideration in favor of the majority position is brought to light by asking what the Chicago Police Department should have done when it decided to discharge Olivieri. His answer is that it should have granted him a hearing. This comes close to arguing that there is no such thing as probationary public employment--that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground.

Finally, there is a qualitative difference, bearing on culpability, between publicizing a stigmatizing ground of dismissal and refusing to do so, that the plaintiff's position would erase. The public employer who goes out of his way to publicize the ground of the dismissal is deliberately taking measures to make it difficult or impossible for the employee to obtain comparable employment, and is thus acting with intent to infringe a constitutionally protected liberty. There is no similar intent in the case in which the employer does not disclose, let alone publicize, the ground of its action. The effect on the employee's future employability is in that case the unavoidable by-product of action taken for a wholly different purpose, that of improving the employer's own work force. The employer in such a case would be unconcerned if the employee found comparable employment elsewhere. The

case is thus at the farthest extreme from the blacklist cases out of which the constitutional doctrine arises.

The appeal presents another issue. The judge refused to permit the plaintiff to depose the defendant until the plaintiff submitted written interrogatories the answers to which would indicate whether deposing the defendant would serve a useful purpose. The judge was influenced in following this course of action by the fact that the superintendent of the Chicago police is a busy official who should not be taken away from his work to spend hours or days answering lawyers' questions unless there is a real need. *Van Arsdale v. Clemo*, 825 F.2d 794, 798 (4th Cir. 1987); *cf. Clinton v. Jones*, 117 S. Ct. 1636, 1650-52 (1997); *Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1143 (7th Cir. 1988).

A district judge's discretion in supervising pretrial discovery is broad, *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994); *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985), and it was not abused here. Quite the contrary; the course the judge followed could well be thought commanded, in the circumstances of this case, by Fed. R. Civ. P. 26(c)(3), which expressly authorizes the district court, in order to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense," to direct "that discovery may be had only by a method of discovery other than that selected by the party seeking discovery." Pretrial discovery is time-consuming and expensive; it protracts and complicates litigation; and judges are to be commended rather than criticized for keeping tight reins on it. *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *cf. Clinton v. Jones, supra*, 117 S. Ct. at 1658 (concurring opinion). The right to take an immediate appeal from the denial of a motion to dismiss a suit on the basis of official immunity is expressly based, in part, on the burden of discovery to public officials. *Behrens v. Pelletier*, 116 S. Ct. 834, 838-39 (1996); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 496 (7th Cir. 1993); *Clinton v. Jones, supra*, 117

S. Ct. at 1657 (concurring opinion). They should not have to spend their time giving depositions in cases arising out of the performance of their official duties unless there is some reason to believe that the deposition will produce or lead to admissible evidence. Under the law of this circuit Olivieri had no case unless the defendant had publicized the ground of Olivieri's discharge. (Even then he had no case against the only defendant whom he has named, the superintendent of the police department, unless the superintendent himself participated in publicizing the grounds of the discharge. *E.g.*, *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978); *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993).) Deposing the superintendent was not necessary in order to get an answer under oath to this simple question; a written interrogatory would do just as well. Perhaps anticipating a negative answer, Olivieri's lawyer did not propound such an interrogatory and the judge therefore quite rightly refused to let him depose the superintendent.

Affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4069

FELIX A OLIVIERI,

Plaintiff-Appellant,

v.

MATT L. RODRIGUEZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 7313 **James H. Alesia,** *Judge.*

[August 15, 1997]

JUDGMENT — ORAL ARGUMENT

Honorable Richard A. Posner, Chief Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FELIX A OLIVIERI,

Plaintiff,

No. 95 C 7313 *v.*

MATT L. RODRIGUEZ,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Matt L. Rodriguez's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons discussed hereafter, Defendant's motion is granted.

I. BACKGROUND

In August of 1994, Plaintiff Felix A. Olivieri was employed by the City of Chicago as a probationary police officer and assigned for training at the police training academy. While at the police training academy, administrative charges were filed against Olivieri by the Chicago Police Department for making statements of a sexual nature to fellow probationary police officers and for making unwelcomed physical advances of a sexual nature toward the same officers. The allegations were investigated. Following the investigation, Defendant Matt L. Rodriguez — the Superintendent of the Chicago Police Department — discharged Olivieri.

Following his discharge, Olivieri applied for employment as a police or security officer with the Northwestern University Police Department, the University of Chicago Police Department, the DePaul University Security Police, and the

University of Illinois at Chicago Police Department. Olivieri informed each of the prospective employers that he had been discharged by the Chicago Police Department because of an allegation of sexual harassment.

Olivieri's step-mother, Rose Olivieri — a police officer — inquired into the possibility of her step-son's employment with the Federal Reserve Police Department, the Evanston Police Department, and the U.S. Marshal's Service. Rose informed each of the potential employers that Olivieri had been terminated due to allegations of sexual harassment.

To date, Olivieri has not been hired by any of the prospective employers.

Olivieri does not know whether Superintendent Rodriguez or any other employee of the Chicago Police Department discussed the sexual harassment allegations with the potential employers.

Olivieri brought a complaint against Superintendent Rodriguez under 42 U.S.C. §1983 premised on deprivations of his constitutionally protected Fourteenth Amendment liberty interest.

This matter is now before the Court on Superintendent Rodriguez's motion for summary judgment.

II. SUMMARY JUDGMENT – STANDARD OF REVIEW

Under FED. R. CIV. P.56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

III. DISCUSSION[1]

Olivieri brings two "independent" §1983 claims premised on the deprivation of a liberty interest: (1) deprivation of an occupational liberty interest in one's post-employment reputation and (2) deprivation of a hearing prior to one's termination to refute the charges and clear one's name.

To establish a successful §1983 claim, Olivieri must show that the conduct complained of was committed by a person acting under color of state law and that the conduct deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990). Superintendent Rodriguez does not dispute that, if actionable, the conduct complained of occurred while he acted under the color of state law; thus, the issue is whether Olivieri was deprived of rights secured by the Constitution.

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1. Superintendent Rodriguez filed a motion to strike Olivieri's affidavit and certain paragraphs of his Local Rule 12(N) response. Since the court does not find the issues discussed in the motions relevant to the analysis, the motions are denied as moot.

A. Occupational Liberty: Post-Employment Reputation

To establish a claim for "deprivation of a liberty interest in one's post-employment reputation, a plaintiff is required to show that (1) he was stigmatized by the defendant's conduct, (2) the stigmatizing information was publicly disclosed, and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure." *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991).

The Court need focus only on the second requirement — public disclosure — to resolve this claim. Olivieri has not come forward with any evidence that Superintendent Rodriguez (or anyone else within the Chicago Police Department) disclosed the stigmatizing information to any of the prospective employers.[2] *See Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986) ("Absent proof that the Police Department or any of the defendants disseminated the stigmatizing information in a manner which would reach future potential employers of the plaintiff or the community at large, she cannot show that the defendants' actions impinged on her liberty interest in pursuing her occupation.") Indeed, Olivieri and his step-mother, not Superintendent Rodriguez or the Chicago Police Department, voluntarily disclosed the damaging information to the prospective employers.

Accordingly, Superintendent Rodriguez is entitled to summary judgment.

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2. It appears that Olivieri believes that Superintendent Rodriguez was burdened with the task of coming forward with evidence that showed affirmatively that he did not disclose the information to the prospective employers. He cites no authority in support. That is, of course, wrong. As an element of his *prima facie* case, Olivieri must come forward with the evidence.

B. Due Process: Lack of a Hearing

Next, Olivieri contends that the failure to grant a hearing prior to his termination deprived him of a liberty interest without due process. As discussed above, however, since there was no public disclosure by Superintendent Rodriguez or the Chicago Police Department, there was no deprivation of a liberty interest.[3] *See Finshur v. Village of Menomonee Falls,* 31 F.3d 1401, 1409 (7th Cir. 1994); *Yatvin v. Madison Metro. Sch. Dist.,* 840 F.2d 412, 417 (7th Cir. 1988); *Ratliff,* 795 F.2d at 625-27 ("[I]f such charges were published, Ratliff had a due process right to a hearing at which she could attempt to refute the charges and and publicly clear her name.") And, since there has been no deprivation of a liberty interest, there is no entitlement to a hearing.[4]

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3. The fact that the stigmatizing information remains in Olivieri's personnel file and will likely be sent to a prospective employer, i.e., a time bomb waiting to explode, is of no consequence. As noted on more than one occasion by the Seventh Circuit, "until the time bomb goes off, the plaintiffs will sustain no injury to their reputations." *Clark v. Maurer,* 824 F.2d 565, 566 (7th Cir. 1987); *see Johnson v. Martin,* 943 F.2d 15, 17 (7th Cir. 1991) ("Likewise, Johnson's 'time bomb' claim — that 'as a matter of logic and common sense' the information in his personnel file will likely reach the public — has yet to detonate.") Similarly, since Olivieri has no evidence that the stigmatizing information was released by Superintendent Rodriguez or the Chicago Police Department to any of the prospective employers (or, for that matter, anyone else), the time bomb is still ticking.

4. Keep in mind, generally speaking, as long as the employer does not publicize the information, it may terminate the employee for no reason at all or for stigmatizing and false reasons. *See Ratliff,* 795 F.2d at 627 n.4.

Accordingly, Superintendent Rodriguez is entitled to summary judgment.

IV. CONCLUSION

For the reasons discussed above, judgment is entered in favor of defendant Superintendent Matt L. Rodriguez and against plaintiff Felix A. Olivieri.

Date: November 13, 1996.

James H. Alesia
United States District Judge

Supreme Court, U.S.
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No. 97-927

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FELIX A. OLIVIERI,
Petitioner,
v.
MATT L. RODRIGUEZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a public employer deprives an at-will employee of liberty without due process of law by discharging him for a potentially stigmatizing reason but does not disclose that reason to any third party or take any steps to prevent the discharged employee from finding a position with another employer.

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CONSTITUTION AND STATUTES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-927

FELIX A. OLIVIERI,

Petitioner,

v.

MATT L. RODRIGUEZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-6) is reported at 122 F.3d 406. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. 8-13) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the court of appeals was entered on August 15, 1997.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive

any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

STATEMENT

In August 1994, petitioner Felix A. Olivieri was discharged as a probationary police officer undergoing training at the police academy of the Chicago Police Department. Pet. App. 8. During the course of his training at the academy, two other probationary officers filed allegations of sexual harassment against petitioner. R. 45 ¶ 4. Following an investigation, respondent Matt L. Rodriguez —then the Superintendent of the Chicago Police Department—discharged petitioner. Pet. App. 8. After his discharge, petitioner sought employment with other police departments, informing them that he had been discharged because of an allegation of sexual harassment. *Id.* at 8-9. Petitioner's stepmother—herself a police officer—inquired into the possibility of employment for petitioner with yet other law enforcement agencies. *Id.* at 9. She also ininformed each that petitioner had been terminated due to allegations of sexual harassment. *Ibid.* Petitioner was not hired by any of these prospective employers. *Ibid.* Petitioner has no reason to believe that Superintendent Rodriguez or any other employee of the Chicago Police Department has informed any potential employer of the reason for his discharge. R. 44, Exh. E at 37, 42, 52, 56-57, 67, 71, 90-91; R. 45 ¶¶ 9-10.

Petitioner brought this suit alleging a deprivation of liberty without due process of law and seeking relief under 42 U.S.C. § 1983. Pet. App. 9. Superintendent Rodriguez sought summary judgment, observing that there was no evidence that he or anyone else within the Chicago Police Department had disclosed any stigmatizing information about petitioner. Pet. App. 11. The district court granted respondent's motion for summary judgment on that basis. *Id.* at 11-13.

The court of appeals affirmed. The court observed that making a defamatory charge about an at-will public employee is not considered in itself to invade a constitutionally protected liberty interest, but that "when the character and circumstances of the defamation are such as to have 'foreclose[d] [the employee's] freedom to take advantage of other employment opportunities' he can bring suit based on the deprivation of his liberty of employment or occupation." Pet. App. 2 (quoting *Paul v. Davis*, 424 U.S. 693, 710 (1976) (first set of brackets in original)). In this case, however, there was "no evidence that the defendant disclosed to anyone the grounds of the plaintiff's discharge." *Ibid.* The court added that, although petitioner and his stepmother may have voluntarily disclosed defamatory material to prospective employers, that voluntary decision was not a deprivation of liberty by the Superintendent. See *id.* at 3-4. Beyond that, the court noted that petitioner's position was tantamount to a holding that the Due Process Clause forbids at-will public employment because whenever an at-will employee is discharged he can claim that that discharge is stigmatizing, even if his former employer takes no action to inhibit prospective employers from hiring the former employee. See *id.* at 4.

ARGUMENT

In this case the Chicago Police Department did no more than discharge a probationary, at-will employee. Since at least *Bishop v. Wood*, 426 U.S. 341 (1976), it has been settled that the discharge of an at-will public employee does not deprive the employee of a constitutionally protected liberty or property interest within the meaning of the Due Process Clause even when the employer discharges the employee for a stigmatizing and allegedly false reason, as long as the employer does not publicly disclose the reason for the discharge. See *id.* at 348-49. Nevertheless, petitioner contends that because he felt compelled to disclose the reasons for his termination to prospective em-

ployers, his discharge should be compared to cases in which the government intentionally releases stigmatizing information that has the effect of foreclosing the plaintiff from obtaining other employment. But precisely because the Chicago Police Department took no action that affected petitioner's future employment prospects other than discharging him, that argument lacks merit. And while petitioner is correct that other circuits have reached a different result, petitioner does not explain why the rule followed in other circuits would benefit him, nor why this conflict has sufficient practical consequences to warrant this Court's review.

1. Petitioner does not question the holding of *Bishop v. Wood* that the discharge of a nontenured public employee—even for a stigmatizing and allegedly false reason —does not deprive the employee of a constitutionally protected liberty interest absent some disclosure of the reason for the discharge. Contrary to petitioner's assertion, this case is not like *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). That case involved a state's decision to preclude the plaintiff from any employment whatsoever in his chosen profession. Here, of course, petitioner remains free to seek employment with other law enforcement agencies, who in turn remain free to make their own decisions on petitioner's application on its merits.

No doubt for this reason, petitioner quickly abandons *Schware* and turns to dicta in *Board of Regents v. Roth*, 408 U.S. 564 (1972), which explains that a public employee would be deprived of a protected liberty interest if "the State, in declining to re-employ respondent imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573. See Pet. 2-3. Of course, this dicta must be read in light of the subsequent holding in *Bishop v. Wood* that the termination of a nontenured public employee, without more, is not sufficiently stigmatizing to amount to a deprivation of liberty within the meaning of

the Due Process Clause. And, of course, any other result would mean that the Due Process Clause in effect forbids at-will public employment. If the mere termination of an at-will employee were considered so stigmatizing as to trigger the constitutional requirement for a hearing, then no public employee could be discharged except for cause and after a hearing.

Petitioner claims that he is compelled to disclose stigmatizing information if he is to respond truthfully to prospective employers who inquire about why he was discharged from the Chicago Police Department. See Pet. 4. On that score, petitioner is little different from any other nontenured public employee who, after his discharge, must parry questions from prospective employers about his employment history. Any time a nontenured employee is fired, that termination will have some adverse effect on the terminated employee's future employment prospects, yet that amorphous and speculative effect was insufficient to amount to a deprivation of a protected liberty interest in *Bishop v. Wood*. As the court of appeals pointed out here, whether petitioner will in effect be compelled to disclose defamatory information about himself is uncertain—he is under no obligation to reveal any particular information to a prospective employer. See Pet. App. 3-4.

Moreover, petitioner's position cannot be squared with the settled rule that an individual has not been deprived of liberty or property within the meaning of the Due Process Clause unless the defendant intends to deprive the plaintiff of liberty or property, or, at a minimum, acts with reckless disregard for the risk that such a deprivation will occur. See, *e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986). Here, there is no claim that the Chicago Police Department discloses the reasons it has terminated probationary employees to prospective employers, or indeed treats such information as anything other than highly confidential. Accordingly, there is no claim in this case that could support a finding that Superintendent Rod-

riguez or anyone else in the Chicago Police Department intends to prevent petitioner from obtaining alternative employment within law enforcement, or even has recklessly jeopardized his chances of obtaining such employment. If petitioner and his stepmother have chosen to jeopardize his future in law enforcement by voluntarily revealing stigmatizing information to prospective employers, that decision cannot be attributed to the Superintendent. As the court of appeals recognized, "there is a qualitative difference, bearing on culpability, between publicizing a stigmatizing ground of dismissal and refusing to do so, that [petitioner's] position would erase." Pet. App. 4.

Finally, petitioner's proposed rule leads to anomalous results. By focusing on stigma, petitioner presumably creates a system under which nontenured employees who are terminated for no particularly stigmatizing reason—or even for no reason at all—have no constitutional entitlement to a hearing. And this dichotomy exists even though an employer discloses nothing to prospective employers about the reasons for a nontenured employee's termination, and thus provides no basis for distinguishing between employees who are terminated for stigmatizing reasons and those who are not. Surely the Due Process Clause should not be held to have abolished at-will employment only for those employees who engage in serious misconduct, especially when prospective employers cannot distinguish between such employees and other nontenured employees who have been fired. Such a rule makes no sense, and as the Court recognized in *Bishop v. Wood,* could only "penalize forthright and truthful communication between employer and employee . . . ." 426 U.S. at 348-49. And to avoid claims that would arise from a discharge of an at-will employee for a reason that would be stigmatizing if disclosed, public employers may resort to concealing the reason for discharge even from the employee himself. Ultimately, not even the employee would benefit from such a system.

2. Petitioner correctly observes that at least three circuits have held that a public employer is deemed to have disseminated stigmatizing information for purposes of a due process claim whenever the plaintiff can show that "stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." *Donato v. Plainview-Old Bethpage Central School District*, 96 F.3d 623, 631-32 (2d Cir. 1996) (quoting *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 45 (2d Cir. 1987)), cert. denied, 117 S. Ct. 1083 (1997). Accord *Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980). See Pet. 3. Petitioner's reliance on this conflict as a basis for plenary review is misplaced for two reasons.

First, it is far from clear that the law of any circuit would benefit petitioner. There is no evidence in this record that the Chicago Police Department has ever disclosed potentially stigmatizing information from the personnel file of a nontenured employee to another prospective employer, much less that the Department is "likely" to do so. In *Buxton*, for example, the stigmatizing information was placed in public records available to potential employers. See 871 F.2d at 1045. In *Ledford* the court concluded that "plaintiff has alleged that certain false information has been circulated and will continue to be circulated to prospective employers." 612 F.2d at 887. Here, the record is clear that petitioner and his stepmother made all the disclosures at issue. Hence, there is no reason to think that petitioner would prevail even in those circuits that have adopted a rule different from that employed by the Seventh Circuit.

Second, the practical significance of this split in the circuits is at best unclear. At most, public employers in circuits that have rejected the Seventh Circuit's approach need only adopt procedures designed to ensure that no adverse information about a former employee is communicated to prospective employers. Employers might, for

example, omit the reasons for a nontenured employee's discharge from the personnel file, or refuse to respond to requests for information from prospective employers. To be sure, that result is far from optimal, but that is a problem for employers, not terminated employees. Similarly, it is unclear that the practical significance of requiring employers either to provide name-clearing hearings or to refuse to share information from their personnel files is so great as to warrant this Court's intervention. Certainly petitioner does not explain why the conflict in the circuits he identifies is of such overwhelming importance that it warrants this Court's exercise of its discretionary jurisdiction to hear this case. Indeed many employers—including the City of Chicago—routinely refuse to provide any information about former employees other than to confirm dates of employment, precisely to avoid litigation. And in the absence of a showing that the conflict in the circuits has created serious practical problems for employers, plenary review is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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